Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-749

IN THE

Supreme Court of the United States

October Term, 1982

PETER F. K. BARABAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATHAN LEWIN
(*Counsel of Record*)
R. STAN MORTENSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Counsel for Petitioner

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED

1. Whether a prosecutor's summation which makes several indirect references to a defendant's failure to testify at his trial can be overlooked on appeal as "harmless error."

2. Whether the prosecution has met its burden of proof in a "net worth" tax-evasion case if it introduces no evidence to negate (a) the existence of a large personal loan, which was reflected on a net-worth statement of the defendant, or (b) the availability to the defendant of large amounts of cash entrusted to him by others.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Carlin v. United States,
351 F.2d 618 (5th Cir. 1965) 8

Griffin v. California,
380 U.S. 609 (1965) 6

Holland v. United States
348 U.S. 121 (1951) 9

United States v. Bates,
512 F.2d 56 (5th Cir. 1975) 8

United States v. Bethea,
537 F.2d 1187 (4th Cir. 1976) 9

United States v. Dorr,
636 F.2d 117 (5th Cir. 1981) 5, 8

United States v. Flannery,
451 F.2d 880 (1st Cir. 1971) 8

Cases: **Page**

United States v. Grasso,
629 F.2d 805 (2d Cir. 1980) 9

United States v. Hasting,
No. 81-1463 ..... 6, 10

United States v. Massei,
355 U.S. 595 (1958) 9

United States v. Rodriguez,
627 F.2d 110 (7th Cir. 1980) 8

Statutes

26 U.S.C. § 7201 2

28 U.S.C. § 1254(1) 1

IN THE

Supreme Court of the United States

October Term, 1982

No.

PETER F. K. BARABAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The decision of the court of appeals (Pet. App. A, p. 1a, *infra*), summarily affirming the petitioner's conviction is not reported.

JURISDICTION

The decision of the court of appeals was issued on December 1, 1981. Petitioner filed a timely petition for rehearing which was denied on August 30, 1982 (Pet. App. B., pp. 2a-3a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was convicted after a trial by jury on three counts of tax evasion (26 U.S.C. § 7201) involving the years 1975, 1976 and 1977, and was sentenced to consecutive three-year terms of imprisonment on Counts 2 and 3, and to a five-year period of probation, to begin at the conclusion of his imprisonment, on Count 1. The court of appeals affirmed the conviction after oral argument without a written opinion.

The prosecution's case was based on the "net-worth" method of proof. Evidence was introduced that during the three tax years petitioner had spent sums exceeding his reported net income in purchasing a home in Palm Beach, furniture and art for that home, expensive automobiles, other real estate, and jewelry. Petitioner's accountant testified that petitioner had told him that he had obtained a $1.2 million interest-free loan from a private source, and that loan had been reflected on a personal financial statement prepared by the accountant in connection with a business transaction. No specific evidence refuting the existence of that loan was presented by the prosecution, and the prosecution omitted the loan from the computation provided to the jury by the prosecution's expert witness. Other evidence introduced during the prosecution's case established that petitioner, who was a lawyer specializing in criminal defense work, received large cash retainers from his clients, which were deposited into his personal bank account.[1]

---

[1]The prosecution also introduced testimony from several witnesses that petitioner's checks to them for goods and services had "bounced." On appeal, the prosecution maintained that in each instance, this highly prejudicial testimony was relevant to some factual issue at trial and that its admission, even if erroneous, was "innocuous."

The defense moved for a judgment of acquittal at the conclusion of the prosecution's case and rested without offering any proof whatever. The theory of the defense at trial was that the prosecution had failed to establish a reasonably certain opening net worth. On appeal the defense also contended that the prosecution had failed to satisfy the burden of proof imposed by this Court's decisions for "net worth" tax evasion cases because it had neglected investigatory leads concerning the $1.2 million loan and the large sums of cash entrusted to petitioner by his clients.

At the conclusion of his summation, the prosecutor told the jury that it might have some "questions" for petitioner's counsel, Mr. Culverhouse (Tr. 1036-1039):

> I don't know what additional questions you might have of me. I have tried to answer some of them or all of them that have occurred to me, and I don't know what questions you might have for Mr. Culverhouse.
>
> But I have a few that I think you might want to ask and I think that he should answer
>
> First: Is there any dispute about the amounts of money that Peter Baraban spent and the increases in his net worth for 1975, 1976 and 1977?
>
> Second: Is there any real dispute about Mr. Baraban's opening net worth as of December 31, 1974?
>
> If there is no question about that, or even if there is, I would imagine that you would ask Mr. Culverhouse what conceivable purpose is there in this record consistent with any reasonable explanation of Mr. Baraban's innocence, except to conceal the source of money.

What conceivable purpose was there for funneling the money into 950 South Miami Avenue Associates through Am-Vest, a corporation not even chartered in the State of Florida.

What explanation is there in this record? Is Mr. Culverhouse going to ask you to believe that Peter Baraban really had a 1.2 million dollar loan?

What proof is there in this record of that loan, except Peter Baraban's self-serving statements that were made to Mr. Levi and the inclusion on the financial statement that was given to Mr. Van Landingham of the 1.2 million as a liability, a financial statement which nevertheless reflects a positive net worth of $858,000.

What reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case, can Mr. Culverhouse give you for Mr. Baraban's failure to deposit all his fees in bank accounts?

If all of the moneys that Mr. Baraban expended in 1975, 1976 and 1977, and particularly the so-called 1.2 million dollar loan, if these were loans or from nontaxable sources, why were they not put into bank accounts, if not to conceal sums of money that Mr. Baraban was receiving?

Does Mr. Culverhouse question it all that 550 South Ocean Boulevard was really Mr. Baraban's house, that he had bought, renovated and landscaped with his own money, with the intention of living there?

And finally, is not the only reasonable inference to be drawn from the concealing of these moneys, that of a guilty mind? We submit that

> the evidence in this case shows that Mr. Baraban evaded his taxes, attempted to evade his taxes for the years 1975, 1976 and 1977.
>
> And that the evidence compels that conclusion beyond any reasonable doubt.
>
> Thank you.

Defense counsel then asked that the jury be excused and objected to the prosecutor's summation on the following ground, *inter alia* (Tr. 1039-1040):

> Second, I think the questions at the end put an inference that my client must come forth with some evidence and I would make a motion for a mistrial based on that.

The district judge denied the motion for mistrial. On appeal, petitioner contended that the prosecutor's references in summation constituted reversible error. The prosecution's response in its "Summary of Argument" in the appellate court was (1) that the remarks were "proper" and "were designed to focus defense counsel and the jury upon the reasonable inferences to be drawn from the evidence" and (2) that "even if the remarks were improper, no substantial right of Baraban was prejudicially affected." Brief for the United States, Fifth Circuit, No. 81-5144 at 24. For the second argument, the government relied principally on the Fifth Circuit's decision in *United States v. Dorr*, 636 F.2d 117 (5th Cir. 1981), which turned on whether a prosecutor's statement in summation had been "harmless error." 636 F.2d at 121. The argument was also elaborated in the body of the brief. Brief for the United States at 49. The court of appeals affirmed the conviction without opinion.

REASONS FOR GRANTING THE WRIT

1. The principal issue presented by this petition is now before this Court in a case that has been fully briefed and will shortly be argued – *United States v. Hasting*,[2] No. 81-1463. The *Hasting* case will probably resolve two questions that bear upon proper disposition of petitioner's conviction:

(a) Whether an indirect reference by a prosecutor to a defendant's failure to testify violates the Fifth Amendment's protection against self-incrimination as applied in *Griffin v. California*, 380 U.S. 609 (1965).

(b) Whether the "harmless error" rule applies to a trial in which the prosecutor violates the defendant's constitutional right with an impermissible indirect reference to the defendant's failure to testify.

By affirming petitioner's conviction without writing any opinion, the court of appeals failed to specify on what principle of law it relied in rejecting petitioner's challenge to his conviction. If this Court were to determine in the *Hasting* case that an indirect reference to a defendant's failure to testify is permissible, there would, of course, be no reason to have any further proceedings concerning that issue on this case. If, however, this Court agrees in *Hasting* with the principle applied by various federal courts that such an indirect reference does violate the constitutional principle of *Griffin v. California*, 380 U.S. 609 (1965), the question in this case – as in *Hasting* – will be

---

[2]Although the case was titled *United States v. Hastings* at the time of the filing of the petition for a writ of certiorari, subsequent briefs indicate that the lead respondent's name is spelled without an "s." We have reproduced the decision of the Seventh Circuit in the *Hasting* case as Pet. App. C, pp. 4a-8a, *infra*.

whether the violation may be ignored if it constitutes "harmless error."

No matter how the Court resolves that legal issue in *Hasting*, it would be necessary to vacate the decision below in this case and to remand the case to the court of appeals for it to decide in the first instance whether or not the error was harmless. At present, there is no way of knowing whether the court below agreed with the prosecutor's initial argument that the indirect references were permissible or with his alternative argument that even if the remarks were improper they were harmless. Following the *Hasting* decision, the outcome of petitioner's appeal is likely to hinge on precisely that clarification.

(a) The impropriety of the prosecutor's several indirect references to the petitioner's failure to testify cannot, we submit, be seriously contested. If one substitutes the words "Mr. Baraban" for the prosecutor's various references to "Mr. Culverhouse" – who was petitioner's trial counsel and therefore his *alter ego* in the mind of the jury – the pointedness of the prosecutor's purportedly "rhetorical" questions becomes entirely clear. In each of the four instances,[3] the prosecutor was asking what ex-

[3]The prosecutor asked (1) what "explanation is there in this record" for "funneling" a loan for purchasing a building through a non-Florida corporation, (2) "what proof is there in this record" of the $1.2 million loan, (3) "what reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case" could petitioner's counsel give for the failure to deposit fees in bank accounts, and (4) whether "Mr. Culverhouse question[s] it all" that a building purchased by petitioner "was really Mr. Baraban's house" pp. 3-5, *supra*). None of these questions could be answered, of his own personal knowledge, by petitioner's attorney. The questions were plainly and necessarily directed to petitioner personally, and they inevitably focussed the jury's attention on petitioner's failure to take the stand.

planation the petitioner could offer to rebut a particular inculpatory inference – a question that the jury would naturally and necessarily construe as commenting on petitioner's silence at trial. The prohibition against such a reference cannot be avoided by the stratagem of substituting the name of trial counsel – who is a defendant's *alter ego* in the courtroom – for the identification of the defendant himself.

The repeated indirect references in this prosecutorial summation were more clear violations of the petitioner's constitutional right not to testify than were fleeting references made by prosecutors in cases from other circuits where convictions were reversed. *Compare, e.g., United States v. Flannery,* 451 F.2d 880 (1st Cir. 1971) (prosecution testimony is "uncontradicted"); *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980), and authorities cited therein (references to defendant as "very quiet"). Indeed, earlier Fifth Circuit cases indicate that the language used here by the prosecutor crossed the line separating permissible comment from a violation of the defendant's constitutional right. *Compare, e.g., Carlin v. United States,* 351 F.2d 618 (5th Cir. 1965); *United States v. Bates,* 512 F.2d 56 (5th Cir. 1975).

(b) The court of appeals may have agreed with the above legal propositions as applied to this case but nonetheless affirmed petitioner's conviction because it concluded that the error was harmless. In its brief in the court of appeals, the government relied on *United States v. Dorr,* 636 F.2d 117 (5th Cir. 1981) – a leading Fifth Circuit precedent reviewing the concept of "harmless error" as applied to prosecutorial misconduct in summation. That case was cited not only in the body of the government's brief (Brief for the United States, Fifth Cir., No. 81-5144 at 49), but was the *only* authority cited for this

proposition in the "Summary of Argument." *Id.* at 24. It is probable, therefore, that the court of appeals, even if satisfied of the substantive error, concluded that the error was "harmless." This squarely presents the issue now before this Court in *Hasting*.

2. The prosecution's proof in this tax evasion case established two possible sources of non-taxable income: (a) the $1.2 million personal loan which petitioner had reported to his accountant and which had been shown on a net worth statement, and (b) large amounts of cash that were entrusted to petitioner by his clients. This Court has held in *United States v. Massei*, 355 U.S. 595 (1958), and in *Holland v. United States*, 348 U.S. 121 (1951), that unless the prosecution establishes a "likely source" for illegally unreported income, its proof must negate all possible sources of nontaxable income. Under this governing standard, the prosecution failed to carry its burden of proof because no proof whatever was introduced rebutting the two possible nontaxable sources of income.

In this regard, the decision below conflicts with the Second Circuit's ruling in *United States v. Grasso*, 629 F.2d 805 (2d Cir. 1980), and with the Fourth Circuit's decision in *United States v. Bethea*, 537 F.2d 1187 (4th Cir. 1976). In both cases, courts of appeal reversed tax evasion prosecutions based on "net worth" proof when they concluded that the government had failed to negate possible sources of nontaxable income. By that same standard, petitioner was entitled to a judgment of acquittal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision of the court of appeals should be vacated, and the case remanded for

clarification of the precise ground on which the court of appeals determined to affirm petitioner's conviction. Alternatively, the petition should be retained on this Court's docket pending decision in *United States v. Hasting*, No. 81-1463, and should then be granted and the case remanded for reconsideration in light of *Hasting*. On the second issue presented in the petition, the writ of certiorari should be granted and the case set for plenary consideration.

Respectfully submitted,

NATHAN LEWIN
(*Counsel of Record*)
R. STAN MORTENSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Counsel for Petitioner

OCTOBER 1982

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5144

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER F.K. BARABAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(December 1, 1981)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5144

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
AUG 30 1982

Norman E. Zoller
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER F.K. BARABAN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 1, 11 Cir., 1981, ____ F.2d ____)

( )

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

REHG-6

APPENDIX C

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

Kelvin HASTINGS, Gable Gibson, Napoleon Stewart, Gregory Lamont Williams, and Kevin Wendell Anderson, Defendants-Appellants.

Nos. 80-1224, 80-1225, 80-1246, 80-1247 and 80-1398.

United States Court of Appeals, Seventh Circuit,

Argued Jan. 8, 1981,
Decided Sept. 22, 1981.
Rehearing Denied Nov. 20, 1981.

Before SWYGERT and FAIRCHILD, Senior Circuit Judges, and SPRECHER, Circuit Judge.

SWYGERT, Senior Circuit Judge.

Defendants-appellants Napoleon Stewart, Gregory Williams, Gable Gibson, Kevin Anderson, and Kelvin Hastings allege a number of grounds for reversal of their convictions of three federal offenses: kidnapping in violation of 18 U.S.C. § 1201(a)(1); transporting a woman across state lines for immoral purposes in violation of the Mann Act, 18 U.S.C. § 2421; and conspiracy to commit the foregoing offenses in violation of 18 U.S.C. § 371. Only one of the grounds, prosecutorial misconduct, is of such magnitude as to require reversal. We shall treat that issue in this opinion. The remaining issues are being

disposed of in an unpublished order filed simultaneously with this opinion.

I

About 2:00 a.m. on October 11, 1979, three women were passengers in a car driven by Randy Newcomb in East St. Louis, Illinois. Five men, later identified as the defendants, and riding in a turquoise Cadillac, forced Newcomb's car off the road. Two of the women were taken from the car, and one of them was raped at the scene in the presence of Newcomb. The women were then put into the Cadillac and taken to St. Louis, Missouri, where they were raped and subjected to deviant sex acts.

The women, upon being released from their captors about 6:00 a.m. on October 11, contacted the St. Louis police and furnished descriptions of the five subjects, the vehicle, and the locations of the sexual activity. Acting upon this information, the police located the residence of Napoleon Stewart. The police entered after receiving consent from Stewart's mother. They located Stewart in his home, and placed him under arrest; he later identified the other defendants and the vehicle. The police then arrested Williams, Gibson, Anderson, and Hastings; they also found and seized Williams's turquoise Cadillac. Each defendant was identified by one or more of the victims at lineups arranged by the police.

After a four-day trial, the jury returned guilty verdicts as to each defendant on all counts. The trial judge ordered prison sentences ranging from forty to fifty years. These appeals followed.

[1, 2] The issue that requires reversal relates to the assistant United States attorney's final argument to the

jury. The defendants contend that his remarks were so prejudicial as to deny them a fair trial. The alleged prejudice stems from the fact that the prosecution alluded to the failure of the defendants to deny raping and kidnapping the three women. The pertinent part of the summation appears in the margin.*

This court's statement in *United States v. Buege*, 578 F.2d 187 (7th Cir.), *cert. denied*, 439 U.S. 871, 99 S.Ct. 203, 58 L.Ed.2d 183 (1978), applies with full force to the prosecutorial remarks here:

> Direct reference by a prosecutor to a defendant's election not to testify at trial is clearly proscribed. *Griffin v. California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106] (1965). Indirect

---

*MR. HURSEY [prosecutor]: . . . Let's look at the evidence the defendants put on here for you so that we can put that in perspective. I'm going to tell you what the defendants did not do. Defendants on cross-examination and –

MR. BOOTH [defense council]: I'll object to that, Your Honor. You're going to instruct to the contrary on that and the defendants don't have to put on any evidence.

MR. HURSEY: That's correct, Your Honor.

THE COURT: That's right, they don't. They don't have to.

MR. HURSEY: But if they do put on a case, the Government can comment on it. The defendants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that.

> comments such as the prosecutor's references in this case to "uncontradicted testimony" constitute error when the statements are "manifestly intended to be or [are] of such a character that the jury [will] naturally and necessarily take [them] to be comment on the defendant's failure to testify." *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir.), *cert. denied*, 393 U.S. 846 [89 S.Ct. 131, 21 L.Ed.2d 117] (1968). This court has previously held that when a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference necessarily focuses the jury's attention on the defendant's failure to testify and constitutes error. *United States v. Handman*, 447 F.2d 853, 855 (7th Cir. 1971). *See United States v. Poole*, 379 F.2d 645, 649 (7th Cir. 1967).

578 F.2d at 188.

Only the five defendants and the three victims of the kidnapping and rapes were present when the crimes occurred (other than the rape at East St. Louis). The women testified that these events took place. Only the defendants could have disputed that testimony. It is difficult to imagine a more pointed allusion to the failure of the defendants to take the witness stand other than a direct reference to such failure. Equivocal interpretation is not possible.

As we recently said in *United States v. Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980): "The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur." Despite the magnitude of the crimes committed and the clear evidence of guilt, an application of the

doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights.

The convictions are reversed and the case is remanded for a new trial.

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-749

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER F. K. BARABAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
LIBERO MARINELLI, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in this prosecution for income tax evasion, the prosecutor's comments in closing argument constituted an indirect reference to petitioner's failure to testify.

2. Whether the government's investigation of leads to nontaxable sources of income was adequate under the net worth method of proving tax evasion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Anderson v. *Nelson*, 390 U.S. 523	7
Chapman v. *California*, 386 U.S. 18	7
Fontaine v. *California*, 390 U.S. 593	7
Griffin v. *California*, 380 U.S. 609	7
Holland v. *United States*, 348 U.S. 121	11, 12, 14
United States v. *Allen*, 588 F.2d 1100, cert. denied, 441 U.S. 965	9
United States v. *Austin*, 585 F.2d 1271	8, 9, 10
United States v. *Bates*, 512 F.2d 56	8
United States v. *Bethea*, 537 F.2d 1187	11, 12
United States v. *Boulet*, 577 F.2d 1165, cert. denied, 439 U.S. 1114	13, 14
United States v. *Downs*, 615 F.2d 677	9
United States v. *Dwoskin*, 644 F.2d 418	12, 13
United States v. *Flannery*, 451 F.2d 880	7
United States v. *Grasso*, 629 F.2d 805	11, 12
United States v. *Hiett*, 581 F.2d 1199	12, 13
United States v. *Magana-Arevalo*, 639 F.2d 226	8-9
United States v. *Massei*, 355 U.S. 595	11, 12
United States v. *Normile*, 587 F.2d 784	13
United States v. *Passaro*, 624 F.2d 938, cert. denied, 449 U.S. 1113	9, 10
United States v. *Penosi*, 452 F.2d 217	12, 13
United States v. *Renfro*, 600 F.2d 55, cert. denied, 444 U.S. 941	8, 9
United States v. *Rodriguez*, 627 F.2d 110	7

Cases—Continued: Page

United States v. *Sanders*, 547 F.2d 1037 ..... 7, 8, 9
United States v. *Savarese*, 649 F.2d 83 8
United States v. *Schafer*, 580 F.2d 774 13
United States v. *Sorzano*, 602 F.2d 1201 ..... 8, 9, 10, 11

Statute:

26 U.S.C. 7201 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-749

PETER F. K. BARABAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the district court nor the court of appeals issued a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981 (Pet. App. 1a). A petition for rehearing was denied on August 30, 1982 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of willfully attempting to evade

his personal income taxes for the years 1975 through 1977, in violation of 26 U.S.C. 7201. The district court sentenced him to consecutive terms of three years' imprisonment on two of the three counts on which he was convicted and five years' probation on the remaining count, to commence following service of the sentence of imprisonment. The court of appeals affirmed (Pet. App. 1a).

The government's proof at trial established that petitioner was an attorney who engaged in private practice in Miami and Palm Beach, Florida. Petitioner's specialty was criminal law and a large part of his practice involved defending persons accused of narcotics offenses (Tr. 461-469, 598-599, 601, 607).[1] The government employed the net worth plus non-deductible expenditures method of proof to establish that petitioner had underreported his gross income and, as a consequence, his tax liabilities for 1975 through 1977. The net worth method of proof was necessary because petitioner's clients paid their fees to him in cash, and not all of the cash payments were deposited in his bank accounts.

The government proved that the increases in petitioner's net worth plus his non-deductible expenditures exceeded his reported gross income by $111,898 for 1975;[2] by $934,594 for 1976;[3] and by $859,202

---

[1] "Tr." refers to the transcript of the proceedings in the district court.

[2] G. Exs. 1, 28-31, 149-150, 159-160, 171, 175-176, 186; Tr. 181, 698-701, 734-735. "G. Ex." refers to the government's trial exhibits admitted into evidence in the district court.

[3] G. Exs. 26, 28-31, 34, 37-38, 41-42, 71, 84, 88-92, 99-100, 120, 133, 138, 145-147, 167, 169-170, 179, 185-186; Tr. 133, 174, 181, 217, 275-277, 284, 305, 384, 402, 404, 454, 478, 485-488, 490-507, 510-514, 516, 522-524, 568-570, 575, 601-605, 622-623, 632-633, 698, 726, 728, 735, 780-781, 785, 812-815.

for 1977.[4] The additional amounts of income tax due from petitioner as a result of his underreporting were $45,921 for 1975, $474,540 for 1976, and $429,856 for 1977, or $950,317 for the three years (G. Ex. 186; Tr. 918-923, 931-932).[5]

To establish the starting point required for use of the net worth method, which was December 31, 1974, the government presented evidence to show that it had gathered information throwing light on petitioner's assets and liabilities during the three years prior to those in issue. That evidence established that the government had examined public records in the Florida counties in which petitioner resided, worked, or was known to own property, and the records of all banks with which petitioner was known or thought to have done business. The government also showed that it had interviewed petitioner's father and other relatives to determine whether he had received gifts, inheritances, or other forms of net worth increase from non-taxable sources. G. Exs. 121-126, 134, 137, 139-144, 149-150, 157-160, 186; Tr. 817-830. The

---

[4] G. Exs. 3, 12, 19-20, 23-24, 27-30, 35-36, 40-43, 47-48, 57-59, 64, 71, 86-87, 97, 133, 138, 154, 156, 162, 175-176, 186; Tr. 27, 35-36, 69-70, 84-86, 128, 165, 181, 195, 200, 217, 268, 276, 284, 309, 354-355, 385, 389, 402, 416, 456-457, 527, 535-540, 575, 582, 704-705, 727, 735.

[5] The evidence at trial also established that a large number of nondeductible expenditures made by petitioner during the prosecution years were made in cash. Frequently, petitioner would hand the seller of an item or the provider of some service a shopping bag containing cash in amounts that ranged as high as $100,000. G. Exs. 26, 28-31, 37-38, 41, 71, 78, 84, 88-92, 133-138, 145-147, 167, 169-170, 185-186; Tr. 133, 174, 217, 305, 376, 384, 478, 485-488, 491, 494-507, 510-514, 568-570, 575, 601-605, 622-623, 632-633, 698, 726, 735, 738, 780-781, 785, 812, 813.

government's proof established that on December 31, 1974, petitioner's liabilities exceeded his assets by $43,776. G. Exs. 46, 52, 112-116, 121-126, 139-150, 186; Tr. 303-304, 368-370, 476-487, 721-725.

The government's evidence further established that petitioner's tax returns were prepared by his accountant, Alan Levi. Levi treated all deposits in petitioner's bank accounts as income. Petitioner's secretary, employed at his Miami office, testified that she deposited all fees received at the Miami office in his bank accounts. She recalled on one occasion assisting him in counting $40,000 in cash received as a fee from a client. Levi remembered on another occasion counting at petitioner's request $100,000 in cash received as a fee. The government's evidence indicated that when petitioner made a $43,000 payment on a bank loan in 1976, he paid in cash taken from a satchel containing additional cash. At the time, he said that the money had been received as a fee. The government's evidence established that petitioner had admitted to Levi that he had failed to deposit $50,000 in legal fees for 1977. That admission prompted Levi to include the $50,000 in the gross income reported on petitioner's 1977 tax return (Tr. 601, 613, 657-676, 679-682, 689-691, 790, 807).

The government's evidence disclosed that when petitioner showed his $350,000 Palm Beach residence to Levi, the latter realized that petitioner was receiving large amounts of cash that were neither deposited in his bank accounts nor reported on his tax returns. According to the government's evidence, petitioner explained to Levi that the cash was derived from a $1.2 million interest-free uncollateralized loan. For his own protection, Levi requested and obtained from petitioner a letter confirming that petitioner had

obtained such a loan. No written record of the loan, other than letters and statements originating from petitioner, was uncovered. G. Ex. 180; Tr. 340, 694-697, 803, 854-855, 873-876.

Following denial of petitioner's motion for a judgment of acquittal, petitioner rested without presenting any evidence. During his summation, the government's attorney made the following comments (Pet. 3-5):

> I don't know what additional questions you might have to me [sic]. I have tried to answer some of them or all of them that have occurred to me, and I don't know what questions you might have for Mr. Culverhouse [petitioner's trial attorney].
>
> But I have a few that I think you might want to ask, and I think that he should answer.
>
> First: Is there any dispute about the amounts of money that Peter Baraban spent and the increases in his net worth for 1975, 1976 and 1977?
>
> Second: Is there any real dispute about Mr. Baraban's opening net worth as of December 31, 1974?
>
> If there is no question about that, or even if there is, I would imagine that you would ask Mr. Culverhouse what conceivable purpose is there in this record consistent with any reasonable explanation of Mr. Baraban's innocence, except to conceal the source of money.
>
> What conceivable purpose was there for funneling the money to 950 South Miami Avenue Associates through Am-Vest [petitioner's wholly owned corporation], a corporation not even chartered in Florida.

What explanation is there in the record? Is Mr. Culverhouse going to ask you to believe that Peter Baraban really had a 1.2 million dollar loan?

What proof is there in this record of that loan, except Peter Baraban's self-serving statements that were made to Mr. Levi and the inclusion on the financial statement that was given to Mr. Landingham of 1.2 million as a liability, a financial statement which nevertheless reflects a positive net worth of $858,000.

What reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case, can Mr. Culverhouse give you for Mr. Baraban's failure to deposit all his fees in bank accounts?

If all of the moneys that Mr. Baraban expended in 1975, 1976 and 1977, and particularly the so-called 1.2 million dollar loan, if these were loans or from nontaxable sources, why were they not put in bank accounts, if not to conceal sums of money that Mr. Baraban was receiving?

Does Mr. Culverhouse question it at all that 550 South Ocean Boulevard [the $350,000 Palm Beach house] was really Mr. Baraban's house, that he had bought, renovated and landscaped with his own money, with the intention of living there?

And finally, is not the only reasonable inference to be drawn from the concealing of these moneys, that of a guilty mind? We submit that the evidence in this case shows that Mr. Baraban evaded his taxes, attempted to evade his taxes for the years 1975, 1976 and 1977.

And that the evidence compels that conclusion beyond a reasonable doubt.

ARGUMENT

1. Petitioner first contends (Pet. 6-9) that during closing argument the prosecutor improperly commented on his failure to testify. He asserts that the question presented by this case is the same as that pending before this Court in *United States* v. *Hasting*, No. 81-1463 (argued Dec. 7, 1982); that the decision in *Hasting* will control the result here; and that this case should be either remanded to the court of appeals for clarification of the basis upon which the court affirmed petitioner's conviction or held pending the decision in *Hasting*.

There is, however, no reason to hold this case pending a decision in *Hasting*. In *Hasting*, the court of appeals concluded that the prosecutor's comments constituted an indirect comment on the defendants' failure to testify, and it refused to apply the harmless error doctrine. The sole question before this Court in *Hasting*—unquestionably absent in this case—is whether, assuming arguendo that the prosecutor's remarks did constitute prohibited indirect comment on the defendant's failure to testify, the court of appeals was free to refuse to apply the harmless error doctrine. Here, as we shall show, the prosecutor's comments cannot be construed as a reference to the defendant's failure to testify.[6] Hence, this Court's

---

[6] When a defendant elects not to testify, it is error for the prosecutor to comment, either directly or indirectly, on the failure to testify. E.g., *Fontaine* v. *California*, 390 U.S. 593, 594-596 (1968); *Anderson* v. *Nelson*, 390 U.S. 523, 524 (1968); *Chapman* v. *California*, 386 U.S. 18, 20, 25 (1967); *Griffin* v. *California*, 380 U.S. 609, 615 (1965); see *United States* v. *Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980); *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976); *United States* v. *Flannery*, 451 F.2d 880, 881-882 (1st Cir. 1971).

decision in *Hasting* will have no bearing upon the question presented in the petition.[7]

a. Where, as here, there is no direct comment on the failure to testify, the test employed by the courts of appeals for determining whether a prosecutor's remarks constitute an indirect comment on an election not to testify is " 'whether or not the statement was manifestly intended or was of such a character that a jury would naturally or necessarily take it to be a comment on the failure of the accused to testify.' " *United States* v. *Sorzano*, 602 F.2d 1201, 1202 (5th Cir. 1979) (citation omitted). See also *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976); *United States* v. *Bates*, 512 F.2d 56, 58 (5th Cir. 1975). In applying the test, it is necessary to examine the entire argument and all of the evidence presented to determine the context of the remarks and thus their intended meaning.[8] The proscription against indirect reference does not bar the prosecutor from reviewing the evidence and stating the inferences that he believes can properly be drawn from it,[9] from

[7] The principal argument advanced by the respondents in *Hasting* in support of the decision of the court of appeals rested not on any claim that the court of appeals was obliged to reverse the convictions even if the error was harmless, but rather on the assertion that such action was within the scope of its discretionary supervisory powers. While we believe, and have contended in *Hasting*, that no such power exists, a holding that it does would not avail petitioner since the court of appeals in this case did not elect to reverse his conviction.

[8] *United States* v. *Savarese*, 649 F.2d 83, 87 (1st Cir. 1981); *United States* v. *Renfro*, 600 F.2d 55, 57 (6th Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978).

[9] E.g., *United States* v. *Savarese*, *supra*, 649 F.2d at 87; *United States* v. *Magana-Arevalo*, 639 F.2d 226, 229 (5th

using hypothetical questions in suggesting the inferences to be drawn from the evidence (*United States* v. *Sorzano*, *supra*, 602 F.2d at 1202), from challenging the defense attorney to suggest in his closing argument equally logical inferences to be drawn from the evidence asserted to indicate innocence (*United States* v. *Passaro*, 624 F.2d 938, 944-945 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978)), or from stating that the government's case is undisputed where it is possible to contradict the government's case with evidence other than the defendant's testimony (*United States* v. *Sorzano*, *supra*, 602 F.2d at 1202). Indeed, the rule against indirect references does not bar a comment to the effect that the government's case stands unrebutted where the defendant presents no evidence. *United States* v. *Downs*, 615 F.2d 677, 679 (5th Cir. 1980); *United States* v. *Passaro*, *supra*, 624 F.2d at 944; see also *United States* v. *Sanders*, *supra*, 547 F.2d at 1042-1043.

b. Here, the remarks of the prosecutor were not " 'manifestly intended' " to and were not " 'of such a character that a jury would naturally or necessarily take [them] to be a comment on the failure of the accused to testify.' " *United States* v. *Sorzano*, *supra*, 602 F.2d at 1202; citation omitted. They simply summarized the evidence supporting the government's case and emphasized petitioner's failure to mount a credible defense. Indeed, petitioner's attorney, although objecting to the challenged comments, did not suggest either at trial or before the court of appeals that they were a reference to petitioner's election not to testify. In both instances, petitioner's attorney

---

Cir. 1981); *United States* v. *Renfro*, *supra*, 600 F.2d at 57; *United States* v. *Allen*, 588 F.2d 1100, 1108 (5th Cir.), cert. denied, 441 U.S. 965 (1979).

complained that the prosecutor's comments had the effect of shifting the burden of proof to petitioner, and not that they focused attention on petitioner's failure to testify.

At all events, the comments were clearly a proper challenge to the defense attorney to contradict the prosecutor's interpretation of the evidence as he had presented it in his closing argument. See, e.g., *United States* v. *Passaro*, *supra*; *United States* v. *Austin*, *supra*. Each comment, in the form of a question, was addressed by name to the defense attorney. The defense attorney did in fact respond in his closing argument to the challenge presented by the prosecutor's comments, offering his own interpretation of the various items of evidence noted by the prosecutor.

Moreover, when the prosecutor asked the jury what conclusion other than a guilty intent could be drawn from petitioner's failure to deposit cash fees in his bank accounts, his use of undeposited cash receipts for expenditures, and his use of his solely owned corporation to funnel undeposited cash into a partnership of which petitioner was a member, he was doing no more than suggesting what would be an appropriate inference to be drawn from the evidence. Similarly, the prosecutor's suggestion that petitioner's expenditures for acquiring, renovating, and decorating the $350,000 Palm Beach house were for petitioner's personal benefit was a proper statement as to the inference that he thought could be drawn from petitioner's personal involvement with the house. See *United States* v. *Sorzano*, *supra*. As to the comment that the government's evidence on starting point net worth and the amount of petitioner's expenditures was undisputed, that evidence was of such a character that it could have been refuted without the petitioner's testimony. For example, if the government's evidence

concerning bank balances at the starting point was incorrect, it would have been refuted with a bank statement. Moreover, since the government's case was basically documentary and circumstantial, it was possible to dispute the government's version of the facts, as the defense attorney attempted to do, by demonstrating that the documents did not prove what the prosecutor said they did. The comments, therefore, did not constitute indirect comments on petitioner's failure to testify. See *United States* v. *Sorzano*, *supra*.

2. Citing *United States* v. *Massei*, 355 U.S. 595 (1958), and *Holland* v. *United States*, 348 U.S. 121 (1954), petitioner also contends (Pet. 9) that the government failed to carry its burden of proof in establishing a likely taxable source for the alleged unreported income. In particular, petitioner contends that the government failed to negate two possible sources of nontaxable income: (1) an alleged $1.2 million loan that he claims was substantiated by his reporting it to his accountant and his including it on a net worth statement; and (2) alleged "large amounts of cash that were entrusted to petitioner by his clients" (*ibid.*).[10]

---

[10] Petitioner claims (Pet. 9) that the unreported judgment of the court of appeals here is in conflict with *United States* v. *Grasso*, 629 F.2d 805 (2d Cir. 1980), and *United States* v. *Bethea*, 537 F.2d 1187 (4th Cir. 1976).

In *Grasso*, the court ruled that the government erroneously failed to examine *available* records to determine possible sources of nontaxable income. 629 F.2d at 808. Here, on the other hand (see pages 12-14, *infra*), the evidence showed an exhaustive search of all available records for documents relating to the alleged loan. Furthermore, petitioner, although afforded the opportunity, supplied no leads that were susceptible of follow-up.

Bethea is likewise distinguishable. There, the court ruled that the government's case was not supported by the evidence

But the government's evidence showed that the likely source of unreported income consisted of undeposited cash proceeds from fees generated in petitioner's practice. Furthermore, the evidence showed that the government conducted a thorough investigation and checked all leads that could be pursued.

In order to establish the offense of tax evasion with the net worth plus expenditures method of proof, the government must establish that (1) the taxpayer had increases in net worth and made expenditures in excess of his reported income, and (2) such excess was derived from a taxable source. *Holland* v. *United States*, *supra*, 348 U.S. at 137; *United States* v. *Dwoskin*, 644 F.2d 418, 422 (5th Cir. 1981); *United States* v. *Grasso*, 629 F.2d 805, 807 (2d Cir. 1980); *United States* v. *Hiett*, 581 F.2d 1199, 1201 (5th Cir. 1978); *United States* v. *Bethea*, 537 F.2d 1187, 1189 (4th Cir. 1976). The taxable source may be established by affirmatively proving a likely taxable source for the excess, *Holland* v. *United States*, *supra*, 348 U.S. at 126, 132-138, or negatively proving the absence of any nontaxable source for the excess, *United States* v. *Massei*, *supra*, 355 U.S. at 595-596.

Here, the government's evidence showed that it had conducted a thorough investigation. *Holland* v. *United States*, *supra*, 348 U.S. at 135-136; *United States* v. *Hiett*, *supra*, 581 F.2d at 1201; *United States* v. *Penosi*, 452 F.2d 217, 220 (5th Cir. 1971). The Internal Revenue agents examined public records for the Florida counties in which taxpayer worked, resided, or owned property and the bank records of all

---

(see 537 F.2d at 1189-1192). Here, however, petitioner challenges only the government's failure to prove a likely taxable source.

the banks with which petitioner was known or thought to have done business. See *United States* v. *Normile*, 587 F.2d 784, 786 (5th Cir. 1979); *United States* v. *Penosi*, *supra*, 452 F.2d at 220. Moreover, the agents interviewed petitioner's father, other relatives, and accountant to determine whether he had received funds from nontaxable sources. See *ibid.* The evidence established a likely source, i.e., that petitioner's clients were persons accused of narcotics offenses, that they paid fees in cash, and that portions of the cash receipts were not deposited in his bank accounts. See *United States* v. *Boulet*, 577 F.2d 1165, 1168 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979). For example, the evidence disclosed that in one instance petitioner had received a lump sum of $40,000 in cash as a fee, on another occasion had received $100,000 in cash, and indeed that he had bragged of deriving $25,000 per week ($1.3 million per year) from his practice. Thus, there was more than adequate proof of a likely source for the unreported income.

The first lead that petitioner urges should have been investigated more thoroughly, i.e., the alleged $1.2 million loan, was not reasonably susceptible of further corroboration and therefore does not impugn the prosecution's net worth case. *United States* v. *Hiett*, *supra*, 581 F.2d at 1201-1202; *United States* v. *Schafer*, 580 F.2d 774, 779 (5th Cir. 1978); *United States* v. *Boulet*, *supra*, 577 F.2d at 1168, 1171. The only person who had knowledge of the source of the purported loan was petitioner. But petitioner, although he was asked, refused to provide any information concerning the source of the so-called loan (81-5144 Gov't Br. 34 (5th Cir.)). See *United States* v. *Dwoskin*, *supra*, 644 F.2d at 423; *United States* v. *Schafer*, *supra*, 580 F.2d at 783; *United States* v. *Penosi*, *supra*, 452 F.2d at 220. Petitioner's account-

ant had been told only that (1) the principal of the loan was $1.2 million; (2) it was unsecured and did not bear interest; and (3) no repayments had been made. The financial statement prepared to facilitate a business venture listed the purported loan as an account payable. Since the exhaustive investigation showed the loan was not obtained at a third-party financial institution, there was no way of investigating the lead without petitioner's assistance. *United States* v. *Boulet*, *supra*, 577 F.2d at 1168, 1171.

Finally, petitioner's claim that the government failed to determine whether monies were lent or entrusted to him by clients is equally without basis in fact. The record of this case is utterly devoid of any lead to evidence that petitioner's clients actually lent him money, which the government was obliged to follow up. If they had in fact made such loans, both the names of the clients and the supposed amounts were matters that were uniquely within petitioner's knowledge, and his failure to supply such leads is fatal to this claim as well. *Holland* v. *United States*, *supra*, 348 U.S. at 138. Thus, the evidence amply showed a likely source, and the government pursued all reasonable leads.[11]

---

[11] We note finally that petitioner did not challenge the government's evidence regarding the likely source of his unreported income in the district court, but challenged only evidence regarding the starting point for the net worth theory of proof (Tr. 986-988). He first raised the likely source issue before the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
GLENN L. ARCHER, JR.
Assistant Attorney General
ROBERT E. LINDSAY
LIBERO MARINELLI, JR.
Attorneys

JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 383774 1245